IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

OSA NO. 29 Of 1999.

Date of decision: March 06, 2007.

Devan Modern Breweries Ltd. ……. Appellant.

Vs.

H.P. State Industrial Development Corporation Ltd. and another. ……. Respondents.

Coram

The Hon'ble Mr.Justice Deepak Gupta, Judge.

The Hon'ble Mr.Justice Surinder Singh, Judge.

Whether approved for reporting?

For the Appellant: Pt.Om Prakash Sharma, Advocate with Mr.Rajinder Kanwar, Advocate.

For the Respondents: Mr.Balwant Kukreja, Advocate, for respondent No.1.

Mr.K.D. Sood, Advocate with Mr.B.K. Sood, Advocate, for respondent No.2.

Surinder Singh, J(oral) :

The instant original side appeal has been directed, by the appellant, feeling aggrieved by the judgment and decree passed by the Learned Single Judge in Civil Suit No.1 of 1989 dated 5th March, 1989, whereby the suit for the recovery of Rs.6,15,000/- as damages, on account of alleged illegal cancellation of order No.PUR-I-87/3704 dated 2.6.1987 was dismissed.

ADMITTED FACTS : The appellant, hereinafter called as "**plaintiff-company**" are the brewers and distillers established in the suburb of Jammu in the State of Jammu and Kashmir. The plaintiff-company has been

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Whether reporters of local Papers may be allowed to see the judgment?

manufacturing the rectified spirit besides beer and Indian Made Foreign Liquor (IMFL). The State of Himachal Pradesh had invited tenders for the supply of 10 lac bulk liters of rectified spirit 'A' Grade, 93% strength by volume of 15^0C. The tenders were called which were to be submitted to respondent No.1 hereinafter referred to as "**defendant**". The wide publicity was given to the tenders notice. Pursuant to that, the plaintiff –company had also applied, which was accepted by the defendant No.1, vide letter dated 22.4.1987, whereby the order for supply of 2 lacs bulk litres rectified spirit was placed to the plaintiff. The letter also contained the terms and conditions which inter-alia also contained the conditions that the said order was, subject to geting the import permission by the defendant No.1. from HP Excise authorities and the plaintiff geting the export permission from the Jammu & Kashmir Excise authorities. The supply of 2 lacs bulk rectified spirit was stated to have been supplied on 11th July, 1987. In the meantime, the defendant No.1 on 2nd June, 1987, placed another order (Ext.P-5) for the supply of 4 lacs bulk litres rectified spirit on the same terms and conditions, as was mentioned in the earlier order. The supply schedule was also mentioned in the said letter which is reproduced as under:

"Pur-1-87-3704 Dated: 02 Jun, 87.

M/s Devans Modern Breweries Ltd
Mohri, P/O Talab Tillo
Jammu – 180002.

SUPPLY ORDER FOR RECTIFIED SPIRIT.

Dear Sir,

1. With reference to your quotation No. DMB/129/3910 dated 03 Apr, 1987 for supply of rectified spirit and subsequent negotiation held with your Shri R.K. Mahajan, General Manager (Sales) and letter No. nil dated 10 Apr, 1987 and further negotiations held on 21 Apr 1987 with your Shri R.K. Mahajan and Managing Director, we are pleased to place a supply order on you for 4.00 lakhs bulk litres of rectified spirit on the following terms and conditions:-

Ser. No.	Item	Quantity	Rate per bulk litre
1.	Rectified spirit 'A' grade 93% strength v/v at 15^0C for potable use.	4.00 (Four) lakhs bulk litres (Rs.nine and paise seventy five only)	Rs.9.75 per bulk litre

TERMS AND CONDITIONS

(1) The above rates are ex-your factory at Jammu but inclusive of all taxes, toll tax and levies except that CST @4% will be paid extra by us and 'C' Form will be provided.

(2) Supply schedule : 1.00 lakh bulk litres in the month of June 87, 1.00 lakh bulk litres in the month of July 87, one lakh in August,87 and 1 lacs BL in Sept.87, subject to our getting required permission from HP Excise Authorities, Shimla.

(3) Transport and transit insurance will be arranged by us.

(4) Payment by demand draft at the time of lifting of each tanker.

(5) Consignee: The Officer-on- Special Duty, Country Liquor Bottling Plant, Mehatpur.

(6) Security: Your security of Rs.1.00 lakh lying with us will be valid against this order also and this will be released to you only after successful completion of this supply order.

> **This order is however, subject to our getting import permission from HP Excise Authorities and your getting export permission from J&K Excise Authorities.**
>
> **You are requested to confirm the acceptance of this supply order and approach the Excise & Taxation Commissioner, J&K for obtaining the required export permission and send the same to us immediately so that we may obtain import permission from HP Excise Authorities on its basis."**

In pursuance to the fresh order (Ext.P-5) for supply of 4 lacs out of 10 lacs bulk litres, which was initially accepted, the plaintiff company filed an application with the Excise Commissioner, Jammu & Kashmir on 6th June,1987 for seeking export permission, which was followed by reminder on 14th July, 1987 for expediting the export permission. On 7th July 1987, a letter was received from defendant No.1 urging the plaintiff to obtain the requisite permission within a week positively, so as to enable them to obtain import permit. The plaintiff company replied that the Excise Commissioner, Jammu did not attend the office, due to his illness, however, on 7th July, 1987 he attended the office. He had assured to expedite the matter within 3-4 days which fact is stated to have been informed to the defendant No.1. It was the case of the plaintiff that on 27th July, 1987, the export permission was granted by the Jammu & Kashmir Government, for the export of 2 lacs litres of rectified spirit to the defendants, which was personally handed over to the Branch Manager of the

defendants Shri R.K. Mahajan on 22nd July, 1987. A copy was also dispatched by Excise Commissioner, Jammu & Kashmir to the defendants directly. The plaintiff company was informed through its representative Shri R.K. Mahajan that the order for supply of 4 lacs bulk litres of rectified spirit was cancelled, which letter was received by the plaintiff company on 31st July, 1987.

CASE OF THE PAINTIFF-COMPANY:

It was the case of the plaintiff-company that the defendant No.1 had cancelled the order in undue haste and in illegal manner, whereas, the plaintiff company had made every arrangements for the supply of 4 lacs bulk litres of rectified spirit. The matter was taken up with the defendant No.1, but they justified their cancellation on untenable grounds, because the prices of rectified spirit had gone down and the defendant No.1. Itself purchased rectified spirit on lower rates i.e. @ Rs.7.70 paise per bulk litre from **M/s Ranger Breweries**, Mehatpur, Una. Thus, the premature cancellation of the order had caused loss to them. Thus, claimed the difference of Rs.2.05 per bulk litre for 3 lacs bulk litres of rectified spirit, which according to them was Rs.6,15,000/-. Since the defendants had allegedly caused loss to them to the above extent and despite legal notice, they did not restore the position. Hence the suit.

CASE OF THE DEFENDENTS

The suit was resisted and contested by the defendants. The defendant No.1 vide his written

statement took the preliminary objection of misjoinder and non-joinder of parties and **on merits**, pleaded that since the plaintiff had failed to obtain the permission for the export of 4 lacs bulk litres of rectified spirit, therefore, defendants forced to lift the spirit from U.P. on higher rates. A telegram was sent to the plaintiff with a copy under registered A.D.cover vide letter No.PUR-I-97-7716 dated 15th July, 1987. The plaintiff was further informed to send the requisite permission within a week, positively, failing which the order would be cancelled and the plaintiff shall file claim against them. A telegram was stated to have also been sent on 13.7.1987 to inform the date of lifting. Since the plaintiff failed to obtain the requisite export permission regarding the supply of order Ext.P-5, the order was accordingly cancelled and the plaintiff was duly informed . In nutshell contended that the plaintiff's claim is wrong and unreasonable, therefore, prayed for dismissal of the suit.

Defendant No.2 vide separate written statement questioned the maintainability of the suit against the replying defendant and averred that the supplies were not made in accordance with supply orders, and the Himachal Pradesh State Industrial Development Corporation could not have waited for a long time. Under these circumstances, the defendant No.1 had no other option but to cancel the order. The plaintiff has also filed an application whereby the case set up by the defendant was refuted.

PARTES AT ISSUE

On the pleadings of the parties, learned Single Judge had framed the following issues:

1. **Whether the suit is not maintainable against defendant No.2? OPD-2.**

2. **Whether the contract to supply rectified spirit, as alleged in the plaint, was wrongly and illegally cancelled by defendant No.1. If so, to what effect? OPP.**

3. **Whether the plaintiff is entitled to the suit amount including interest. If so, from whom? OPP.**

4. **Relief.**

The parties led their evidence and upon hearing the learned counsel for the parties and upon going through the records, the learned Single Judge held that the tenders for the supply of rectified spirit were invited for the use in Country Liquor Bottling Plant, Mehatpur (HP), which initially was under the management and control of defendant No.1, but was later transferred alongwith other Units to the Himalaya Fertilisers Ltd. i.e. defendant No.2. Since defendant No.2 was transferee-Corporation to which the management and control of the Country Liquor Bottling Plant, Mehtapur was handed over by defendant No.1 as aforesaid. Thus, it was held that the suit was maintainable against the defendant No.2, but returned the findings on Issues No.2 and 3 against the plaintiff. Consequently, suit was dismissed.

Contention in Appeal.

The plaintiff did not feel satisfied and filed the instant appeal on the grounds that the evidence on

record was not read in the right perspective by the learned Single Judge and further that the fault lays with the defendants, who were to lift the spirit after arranging the transportation of the same, because as per the contract, plaintiffs were only to supply the spirit ex-factory. On account of the fact that the prices of the rectified spirit had come down, the defendant No.1 was not right in canceling the order,. It was also contended that the terms and conditions of supply orders were not properly appreciated by the learned Single Judge, hence, the findings on the issues against the plaintiff-company are based on incorrect reasoning, therefore, prayed for the acceptance of the appeal.

We have heard the learned counsel for the parties and have carefully gone through and examined the evidence on record.

Pt. Om Prakash Sharma, learned counsel for the plaintiff has taken us through the evidence led by the plaintiff and the defendants and also took pains to show that the issue-wise findings arrived at by the learned single were incorrect. His main stay of the argument was that the plaintiff was only required to take the export permission from the Jammu & Kashmir Government, which was obtained and the defendants were required to lift the consignment after obtaining import permission from the Himachal Pradesh Government. Since the plaintiffs have taken every step to perform the part of the agreement and the failure

was on the part of the defendants, the suit ought to have been decreed.

We have scanned the evidence in extenso. Before jumping to any conclusion at the very outset, it would be relevant to give the brief count of the evidence of the parties.

Shri R.K.Mahajan is General Manager and duly authorized person of the plaintiff-company,to make statement on their behalf. He has proved the supply order Ext.P-4 dated 22.4.1987, whereby the defendant No.1 had placed the order for 2 lacs bulk spirit at the rate of Rs.9.75 paise per bulk litre subject to the terms and conditions mentioned therein and Clause 2 regulated the supply schedule of the order Ext.P-4, which is as under:

> "Supply Schedule: In the month of May, 1987 subject to our getting required permission from HP Excise Authorities."

He has admitted that this order was accepted by the plaintiff's company and the supply started from the list week of May, 1987 and another supply order of 4 lacs bulk litres of rectified spirit Ext.P-5 dated 2nd June, 1987, as quoted above was also placed with them which was also accepted by the plaintiff. The supply schedule was as under:-

> "Supply-Schedule: 1.00 lakh bulk litres in the month of June, 87, 1.00 lakh bulk litres in the month of July, 87, one lac BL in August 87, and 1 lac BL in Sept.87, which was subject to getting required permission from HP Excise Authorities, Shimla and plaintiff getting permission from Jammu & Kashmir Excise Authorities".

On accepting this order, the plaintiff sent a letter dated 6th July, 1987 Ext.P-5 to the Excise Commissioner, Jammu & Kashmir, requesting him to issue the permission for export of 4 lacs bulk litres of rectified spirit. According to PW-1, the Excise Authorities of Jammu & Kashmir objected to grant the permission for supply of 4 lacs bulk litres because the supply of earlier order was still pending and had not been completed, which was otherwise completed on 11th July, 1987. It is admitted by him that the defendants had urged the plaintiff company to obtain the requisite permission from the Excise Department of Jammu & Kashmir within a week vide Ext.P-7, so as to enable the Excise Department to grant the import permission, but it was beyond the control of the plaintiff company, as the sanction was to be accorded by the Excise Authorities of Jammu & Kashmir Government which fact was said to have been brought to the notice of the defendant-Corporation vide letter Ext.P-8. Further he has stated that he handed over the sanction of Jammu and Kashmir Government on 29th July, 1987 to Shri L.R. Sharma, Manager (Purchase) of the defendants-Corporation, by which date the defendants-Corporation decided to cancel the supply order and handed over the copy of cancellation to him. Further according to him, rectified spirit which was to be supplied to the defendant-Corporation was ready with the plaintiff-company after it was manufactured by them, but defendants-corporation did not pay any heed to that.

In the cross-examination, it is clearly admitted that the supply in respect of order (Ext.P-4) for 2 lacs bulk litres was to be made in the month of May, 1987 itself and further that when the sanction was placed with them vide Ext.P-5, the Jammu & Kashmir Excise Commissioner informed that the requisite permission will be issued after the supply Ext.P-4 is completed by the plaintiff-company. He has further admitted that there was no term in the Ext.P-5 that if the plaintiff company are unable to make supply for one month then despite this fault, they will be allowed to make the supply for the next time. He also admitted that between 6th June, 1987 to 14th July, 1987, the plaintiff company could not obtain the requisite permission as the Jammu & Kashmir Excise Commissioner as aforesaid. It is pertinent to note that he has further admitted that defendant No.1 had communicated them to supply the bulk order within a week , failing which the bulk order would be cancelled and further that the plaintiff company could not supply any quantity to the defendants-Corporation."

PW-2 Prem Dewan has proved the documents Exts.P-3 and P-4 which otherwise also are not in dispute, but he has further stated that he has personally met the Jammu & Kashmir Excise Commissioner to grant the requisite permission on the basis of Ext.P-6, but said Commissioner stated that unless earlier export permission is completed, no fresh export permission would be granted. The said Commissioner was not attending the office due to his indisposition till

16.7.1987, but no communication or any letter to this effect has been produced by this witness to substantiate his claim. He has also stated in the cross-examination that during the relevant period the rectified spirit was not supplied by the plaintiff to any other party, except defendant No.1and it is admitted that the supply in respect of the order placed by defendant No.1 in the month of May, 1987 for 2 lacs bulk litres itself and further admitted that it was the responsibility of the plaintiff to obtain the requisite export permission from the Jammu & Kashmir Government within time and he also admitted that the supply in respect of the order placed in the Month of May, 1987 was completed on 11.7.1987".

PW-3 Ramesh Malhotra has been examined to show the stock register of the plaintiff company, but it is admitted by him that during the year 1987, he was posted with the plaintiff-company.

On the other hand, the defendants-Corporation has examined DW-1 Shri H.S. Verma and DW-2 Shri L.R. Sharma. The perusal of their statements show that they have substantiated the claim, which the defendants have initially set in the written statement. Shri H.S. Verma, (DW-1) has stated that Country Made Liquor Bottling Plant was owned by defendant No.1, till 31.3.1988 and w.e.f. 1.4.1988 it was transferred to M/s Himalaya Fertilisers Limited with all its assets and liabilities and then it was renamed as Himachal Pradesh General Industries

Corporation Limited and Defendant No.2 and he has proved the Notification Ext.D-1/A to this effect.

On the critical examination of the evidence aforesaid, it is absolutely clear that the plaintiff-company failed to comply with the terms and conditions of the supply order and the supply schedule Exhibits P4 and P5 were never adhered to. In the context of the terms and conditions governing the contract inter se the parties even on the perusal of the statements of the witnesses produced by the plaintiff shows that the plaintiff-company could not complete the order passed to them vide Exhibit P-4 and thereafter committed another fault with respect to ExhibitP-5 aforesaid. The supply schedule which was indicated in the supply order Ext.P-4 admittedly was to be completed in the month of May was otherwise completed in July,1987. It was well within the knowledge of the plaintiff-company that the defendant shall cancel the order if they failed to supply the bulk order and it was made clear vide letter Ext.P-7. Therefore, the cancellation of the supply order Ext.P-5 was after due notice and affording an opportunity to perform their part of the contract. The plea taken for its non-compliance is not at all convincing. Further from the evidence on record, it is clear that the plaintiff-company was neither prompt nor adhered to the schedule in making the supply of the requisite quantity of the rectified spirit to the defendant for manufacturing country liquor. Consequently, the defendants were forced to purchase the same from the other State and

the supply order Ext.P-5 was correctly cancelled like any prudent business person to get the said item on cheaper rates, for that the plaintiff company had itself given a cause and an opportunity to the defendants to take the extreme step. Hence, no fault can be found with the defendants.

No other points urged.

Therefore, in these circumstances and viewed from every angle, we do not find anything, which could impel us to reverse the findings arrived at by the learned Single Judge, in favour of the plaintiff. Accordingly, we affirm the issue wise findings given by the learned Single Judge and the appeal is dismissed with costs.

(Deepak Gupta)
Judge

March 06, 2007.
(Pds)

(Surinder Singh)
Judge.